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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

CLARENCE EUGENE MIDDLEBROOKS, JR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINION BELOW

The Order of the District Court (App. 12a-13a) is unreported. The opinion of the Fifth Circuit Court of Appeals is attached. (App. 1a-7a).

JURISDICTION

This is a Motion to Vacate Judgment and Sentence, brought in the District Court of the United States for the Middle District of Florida. The District Court had jurisdiction under 28 U.S. code § 2255. From a denial of said Motion, Petitioner filed Notice of Appeal to the

United States Court of Appeals for the Fifth Circuit on September 2, 1971, that Court having jurisdiction of the appeal under 28 U.S. code § 1291.

The final judgment of the Court of Appeals affirming the judgment of the District Court was entered on March 27, 1972 (App. 1a-7a). This petition for Writ of Certiorari was filed on , and was granted on . The jurisdiction of this Court rests on 28 U.S. code § 1254(1).

QUESTIONS PRESENTED

1. Whether it is a denial of the Defendant's rights under the Fourteenth and Sixth Amendments to the Constitution of the United States, when a Federal Court, which had not conducted a reasonably thorough investigation to determine the Defendant's mental competence to waive his constitutional rights, denies a Motion to Vacate Judgment and Sentence, after the Defendant offered unrefuted evidence that he was mentally incompetent at the time of trial and was therefore incapable of waiving his right to assistance of counsel.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an im-

partial jury of the State and District wherein the crime shall have been committed, which district shall not have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV (Section 1)

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 26, 1968, a Federal Grand Jury at Orlando, Florida returned a twenty-one count indictment against the Petitioner, Clarence Eugene Middlebrooks, Jr., the indictment charged the Petitioner with using the mails to defraud, in violation of 18 U.S.C.A. § 1341.

After being advised of his rights by the Court, the Petitioner on January 30, 1969, advised the Court that he wished to proceed without the benefit of counsel.

The trial by jury of Petitioner, acting as his own counsel began on March 10, 1969, and ended on March 20, 1969, when the jury returned its verdict finding Petitioner guilty on Counts 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21.

On May 6, 1969, Appellant was fined $4,000.00, sentenced to two years imprisonment and to five years probation to run consecutive to the sentence of imprisonment.

A Motion to Vacate Judgment and Sentence under 28 U.S.C.A. § 2255 was filed by Petitioner on March 24, 1971.

Hearing on Petitioner's Motion was held on August 23, 1971. On August 24, 1971 an Order denying Petitioner's Motion was entered by the Court.

A Notice of Appeal was filed on September 2, 1971. The Appeal was denied March 27, 1972. Petition for Rehearing which was filed April 6, 1972 was subsequently denied on April 20, 1972.

The basic finding of fact in the Court below was to the effect that Petitioner was fully apprised of his rights and fully possessed of his faculties when he refused the assistance of counsel at his 1968 trial. This finding was based on the premise that the psychiatrist's testimony did not compel a conclusion that, as a Matter of Law, Petitioner was incapable of knowingly and intelligently waiving his right to counsel. The Court below also stated that a thorough inquiry

into Petitioner's intentions and capacities had been made by the trial judge in accepting Petitioner's waiver.

Petitioner urges, in specifying errors of the Court below, that a thorough search was not exercised on behalf of the trial judge since a psychiatrist was not appointed at the time of trial to ascertain the mental wherewithal of Petitioner to competently waive assistance of counsel.

SUMMARY OF ARGUMENT

Petitioner was not thoroughly examined by the Court at the time of trial to determine his mental competence and therefore his ability to waive a fundamental constitutional right. The testimony of the examining psychiatrist clearly showed that there were reasonable grounds for the contention that Defendant was not mentally competent at the time of the trial. Although a judge may be well intentioned and possessed of acute perceptory powers, he is not medically qualified to render an opinion to the effect that a person is sane and competent to a reasonable medical certainty without being advised by an expert. Where a judge does not resort to expert opinion in determining mental competency his opinion is essentially limited by his lay abilities. However, if one accepts the premise of the Court below, that a thorough investigation as to mental competence was conducted by said Court, then a judge is imbued with the power to accept a waiver of constitutional rights on the most cursory examination of the circumstances surrounding the defendant's case.

To accept the aforementioned premise, as judicial precedent, does violence to the concept of "due process of law" as embodied in the 14th Amendment to the United States Constitution and should, therefore, be reversed.

ARGUMENT

Where a Defendant offers psychiatric testimony corroborating a claim of mental incompetence, at a trial in which the defendant waived his right to counsel, there is a denial of due process of law when the court is allowed to disregard the expert testimony, as being of no legal consequence on the strength of a pro forma inquiry by the court at the time of the waiver, which indicated to the court's satisfaction that the defendant was knowingly, intelligently and competently waiving his constitutional right yet, at the same time, the inquiry contained no expert opinion nor psychiatric investigation into the defendant's mental competence.

A. *One can appear rationable and reasonable to a layman while in actuality being mentally ill.*

Mental competence is deceiving and not clearly perceptible to the layman in many instances. This principle was recognized in *Beale v. United States*, 317 F. Supp. 731 (1970), wherein the court held that the petitioner lacked mental competency to stand trial by reason of a severe mental disorder. Petitioner would refer to the reasoning of the court at page 737:

"The critical question, of course, is whether Petitioner had adequate mental competency at the time of trial. Perhaps the best argument that he had such capacity stems from the fact that neither the veteran trial judge, the U.S. Atty., nor defense counsel thought that a mental examination for Petitioner was appropriate under the circumstances. *Yet the evidence shows the fact that one suffering from a mental disease may appear rationable and reasonable to a layman although his judgment is by reason of such disease, grossly impaired, which interferes with a rationale understanding.*"

B. *There is a judicial duty to investigate the circumstances of a case thoroughly before accepting as proper the defendant's waiver of his constitutional right to counsel.*

In cases of a waiver of right to counsel, there rests upon the Court, the duty to determine whether the waiver was intelligently and competently made by the accused, since there is a strong presumption against such a waiver. *Johnson v. Zerbst*, 304 U.S. 458 (1938), In *Johnson v. Zerbst*, supra, the Court clearly stated the Court's duty at 465:

"a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does

not automatically end the judge's responsibility.

The thoroughness of the Court's investigation in order to effect a valid waiver was set forth in *Von Moltke v. Gillies*, 332 U.S. 708 (1948), wherein the Court stated:

> "To be valid such waiver must be made with an appreciation of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses in mitigation thereof, and all other facts essential to a broad understanding of the whole matter."

Petitioner in the instant case was advised by the Court of his right to counsel and of the consequence, should he represent himself, and of the possible punishment. Yet Petitioner persisted in waiving his right to counsel. The Court accepted this action as a competent and intelligent waiver apparently feeling that it was inappropriate under the circumstances to order a mental examination of the Petitioner. However, just as in the case of *Beale v. United States*, supra, it appeared upon later psychiatric examination that the Petitioner was suffering under a paranoid condition and hypomania which was not perceptible to the untrained layman. The Court's investigation was therefore, of a superficial nature and should be weighed accordingly.

C. *Unrebutted medical evidence asserting mental incompetence to waive a constitutional right should not be disregarded on the strength of a Court's superficial inquiry indicating competent waiver of counsel.*

That a medical opinion cannot be arbitrarily dismissed, or disregarded, particularly where it is uncontradicted and in no way impeached or discredited has been emphasized in several cases. *Pack v. Celebrezze*, 214 F. Supp. 692, *Werz, v. Werz*, 214 P2d 839.

The expert testimony in the instant case was unrebutted however, the Court chose to disregard it in opting for its own previous intrepretation of the Petitioner's mental competency during the trial which contained no psychiatric analysis. The effect of this decision is to equate lay opinion with expert opinion. The Court simply discounted the unrebutted expert testimony and held contrary to it on the strength of its lay analysis that the Petitioner's actions were those of an intelligent and competent man who had a rationale understanding of his waiver of counsel.

It is submitted that due process of law requires an expert opinion, as to mental competency, to weigh more heavily in evidence than a lay opinion in the determination of whether a fundamental constitutional right has been intelligently waived. To hold otherwise discredits principles of justice and equality embodied in the constitutional phrase "due process of law".

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the Court below should be reversed and the cause remanded with instructions to grant Petitioner's Motion to Vacate Judgment and Sentence.

Respectfully Submitted

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief for Petitioner was furnished by mail to Allen Todd, Esquire, Assistant United States Attorney, P. O. Box 2593, Orlando, Florida, this 25 day of May, 1972.

J. RUSSELL HORNSBY of
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311 North Rosalind Avenue
Orlando, Florida
Attorney for Petitioner

APPENDIX

APPELLATE COURT OPINION

(March 27, 1972)

Before BROWN, Chief Judge, GOLDBERG and MORGAN, Circuit Judges.

GOLDBERG, Circuit Judge: Clarence E. Middlebrooks, Jr., was convicted in 1968 of using the mails to defraud in violation of 18 U.S.C.A. § 1341. *United States* v. *Middlebrooks*, 5 Cir. 1970, 431 F.2d 299, *cert. denied*, 1971, 400 U.S. 1009, 91 S.Ct. 569, 27 L.Ed.2d 622. In 1971, on the same day that he began to serve his sentence for the 1968 conviction, Middlebrooks moved in the lower court to vacate judgment and sentence pursuant to 28 U.S.C.A. § 2255. The district judge denied the motion, and Middlebrooks appeals essentially on two grounds: (1) that as a matter of law he did not knowingly and intelligently waive his right to counsel in his 1968 trial, and (2) that this 1968 trial should have been foreclosed by the doctrine of judgments loosely termed "collateral estoppel." Finding neither contention to have merit, we affirm the lower court's dismissal of the motion to vacate.

It appears that Middlebrooks was engaged in 1968 in the manufacture and sale of automotive turbine and supercharger "kits." In that capacity, he was investigated and indicted on 21 counts of mail fraud. At a hearing held prior to the 1968 trial and at the trial itself, Middlebrooks emphatically waived his right to

counsel, stating at both times that he preferred to argue his own case. To compress the facts of that trial, Middlebrooks alleged harassment by the Post Office, lost, and was convicted and sentenced on 16 counts of the indictment. Having failed in his direct appeals and exhausted his motions to extend time prior to the commencement of sentence, Middlebrooks entered federal custody and immediately filed this section 2255 proceeding.[1]

Three of Middlebrooks' four allegations of error in the hearing below boil down to the assertion that he did not, as a matter of law, knowingly and intelligently waive his right to counsel in his 1968 trial. The standards applicable for evaluating intelligent and knowing waiver were sketched in *Johnson* v. *Zerbst*, 1938, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461:

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

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[1]The opinion of this court affirming Middlebrooks' conviction on direct appeal, United States v. Middlebrooks, *supra*, states that Middlebrooks' sentence was suspended. However, both briefs in this habeas corpus appeal indicate that Middlebrooks is presently incarcerated.

304 U.S. at 464. It is the conclusion of this court that the record supports the trial judge's conclusion that Middlebrooks was fully apprised of his rights and fully possessed of his faculties when he refused the assistance of counsel at his 1968 trial.

Middlebrooks had apparently been indicted and acquitted on a similar charge in 1958. It appears from the record that he took the opportunity of this second indictment in 1968 to vent his spleen at the Post Office. He rejected the district judge's proffer of counsel on two separate occasions because he felt that he could best "get his licks in at the Post Office" *personally* without the assistance of counsel. Whatever its wisdom, that is a reasonable exercise of Middlebrooks' freedom of choice. For his decision Middlebrooks can perhaps be faulted with poor judgment,[2] but the trial judge cannot on that evidence be faulted for failing to remind Middlebrooks quite adequately that he would be better advised to accept counsel. Rather, the trial judge in 1968 conducted a thorough inquiry into Middlebrooks' intentions and capacities. *See Von Moltke v. Gillies*, 1948, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309.

At his hearing in the court below, Middlebrooks also alleged that he was not mentally competent to intelligently and knowingly waive counsel at the time of his 1968 trial. To prove this assertion, Middlebrooks pro-

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[2]Perhaps Middlebrooks did not exercise such poor judgment after all. As the Government points out in its brief, Middlebrooks did manage to convince the jury in 1968 that he was not guilty of 5 of the 21 counts in the indictment. We cannot say at this point that counsel would have done a better job.

duced at the hearing a psychiatrist who testified that in his opinion Middlebrooks was "mentally ill" at the time of the earlier trial. The expert examined Middlebrooks on two successive days some three years after the initial trial on the merits and concluded that Middlebrooks was suffering from hypomania at the time of the interview and that, in the expert's opinion, Middlebrooks was also suffering from hypomania at the time of trial. Even though an expert's opinion and testimony are not to be disregarded, the decision regarding Middlebrooks' mental wherewithal as a matter of law is one that must be made by a court. Although the Government did not produce any contrary expert testimony at the hearing, that fact alone does not support Middlebrooks' assertion that the district judge below simply disregarded the expert's testimony. Taking all of the circumstances of this case into consideration, we agree with the district judge that the record does not support Middlebrooks' assertion that he lacked the mental competence for an effective waiver.

The Government relied in part on the transcript of the earlier trial and on Middlebrooks' overall behavior at that trial. In addition, the Government pointed out that Middlebrooks' actions before, during, and after the trial were not those of a man incapable of making an intelligent and knowing decision. Middlebrooks had been engaged in a reasonably complicated, even if questionable, business. It appears that Middlebrooks retained attorneys in other matters. After he had lost in the district court on his own, Middlebrooks retained various attorneys to pursue his direct appeals without

raising at those times the issue of knowing and intelligent waiver of counsel. Following the failure of his direct appeals, Middlebrooks filed various motions for the purpose of extending the time before his sentence was to commence, which were granted. We do not find anything in the history of this case or in Middlebrooks' behavior with respect to the facts that gave rise to the original indictments that would support a conclusion that he was incapable of making an intelligent waiver. Finally, it appears to this court, as it did to the district court below, that the psychiatrist's testimony does not compel a conclusion that, as a matter of law, Middlebrooks was incapable in 1968 of knowingly and intelligently waiving his right to counsel. The expert saw Middlebrooks only twice within two days and did not have a complete medical and social history at the time. When asked by the district judge if Middlebrooks' hypomania rendered him incapable of making an intelligent decision, the expert answered in the negative. In fact, it appears that the expert relied rather heavily on the very fact that Middlebrooks did decline counsel in 1968 to establish his hypothesis of hypomania at that time, a conclusory analysis at best. Considering the entire testimony of the expert, it appears to this court that the psychiatrist's testimony neither compels nor lends substantial support to the proposition that, as a matter of law, Middlebrooks could not have intelligently and knowingly waived his right to counsel in 1968.

Middlebrooks also asserts that the doctrine of collateral estoppel should apply to vacate his 1968 conviction, since he had been indicted and acquitted of a

similar offense in 1965. The doctrine of judgments that Middlebrooks argues here is inapposite to this set of facts. It is not enough to assert similarity of business and manner in the earlier acquittal, even if this record were sufficient to establish such similarity. A court must first examine what the first judgment actually determined and then see how that earlier determination affects the case in which collateral estoppel is urged. *See United States v. Kramer*, 2 Cir. 1961, 289 F.2d 909. The first judgment of acquittal in the Middlebrooks saga involved a different corporation, different victims, and a different factual context. In addition, the first judgment occurred a decade prior to the trial that has been questioned in this section 2255 appeal. A defendant cannot be allowed to engage in fraud forever simply by employing a few of the factors that might have been present in an earlier acquittal. It is always difficult to outline the precise perimeter of a prior judgment when the judgment was simply "not guilty," but we must conclude from the record before us that the acts under indictment in Middlebrooks' 1968 trial were of sufficient difference in character that the doctrine of collateral estoppel would not apply to bar later prosecutions. The two cases simply do not involve the same set of actions and facts. *See Sealfon v. United States*, 1948, 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180.

It is the conclusion of this court that Middlebrooks simply has not made his case on the record before us that he did not knowingly and intelligently waive his right to counsel at his trial in 1968. The most that this record will support is that Middlebrooks

probably made an error in judgment, but the law does not protect him from that. The district court's denial of the motion to vacate judgment and sentence is affirmed.

AFFIRMED.

MOTION TO VACATE JUDGMENT AND SENTENCE

(Number and Title Omitted)

Filed: Mar. 24, 1971

TO: HONORABLE GEORGE C. YOUNG
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CLARENCE EUGENE MIDDLEBROOKS, JR., Movant herein, moves this Court for an Order vacating and setting aside the judgment and sentence herein and states:

1. That the files and records of this case do not conclusively show that the prisoner is not entitled to relief under USCA 28, Section 2255.

2. On March 20, 1969, Movant was found guilty by this Court after a Jury Trial of a felony and was sentenced to a term of two years in Federal prison and a total fine was imposed to be paid in the sum of four thousand dollars ($4,000.00). In addition, said Defend-

ant, as to Counts 6, 9, 13, 15, 17, 19 and 21, was placed on five years' probation.

3. Movant would show unto this Honorable Court that at the time of the arrest and at all times material to the trial the said Defendant was of deranged mind because of his open hostility toward Postal Authorities and imprudently failed to obtain counsel to properly prepare and try his case. While Defendant was advised of his right to be represented by counsel by the Court-Defendant, because of emotional strain to which he had subjected himself, failed to so do; that he was not properly trained to present evidence and was ignorant of the law.

4. That following his conviction Defendant retained counsel for the purpose of appealing the judgment and sentencing of this Court; that the Appellate Court in a two-to-one decision affirmed the lower court and the Supreme Court of the United States has denied Defendant's Petition for certiorari; that said Defendant by Order of this Court is to commence serving his sentence at 12:00 Noon on March 24, 1971; that counsel should have raised in his appeal estoppel by judgment and/or double jeopardy res judicata in that this Defendant alleges that the United States of America should not have prosecuted the indictment against him because he says that heretofore, on or about July 9th, 1958, United States of America was plaintiff and this Defendant was defendant and identical charges brought by the United States of America and said case was tried in the United States District Court for the Northern District of Georgia, Atlanta Division; that

said Defendant does not have a certified copy of said record to attach hereto but requests a reasonable opportunity to obtain the transcript of record including the indictment and jury verdict and judgment of acquittance. The said Defendant entered a plea of not guilty to said indictment and the United States of America joined issue on said plea and the jury thereupon duly impaneled and sworn to try the issue, upon their oaths did say that the said CLARENCE EUGENE MIDDLEBROOKS, JR. was not guilty of the offenses in said indictment, whereupon it was considered by the said Court that the said CLARENCE EUGENE MIDDLEBROOKS, JR., be discharged and said jury be discharged from the further consideration thereof, as by the record thereof more fully and at large appears, which said judgment still remains in full force and the said CLARENCE EUGENE MIDDLEBROOKS, JR. avers that in said case said court had jurisdiction of the subject matter and of his person and that he is the same CLARENCE EUGENE MIDDLEBROOKS, JR. who was the defendant in the indictment cited in this motion and acquitted as aforesaid; and that he and said CLARENCE EUGENE MIDDLEBROOKS, JR. who was the defendant in the indictment cited in this motion are not different persons and that the offenses set out are one and the same offenses and not divers and different offenses and that said Defendant following said jury verdict believed in good faith that he could continue on in his occupation and trade and continue to do business in the manner in which he had, due to said judgment of acquittal. Defendant would show unto this Honorable Court that said United States of America ought not be able to proceed in

the matter in that there was no criminal intent; it is respectfully submitted that the verdict of acquittal should have been introduced into evidence during the course of the trial in order for the Defendant to have established lack of criminal intent should the court determine that this was a continuous business operation; that the indictment to which the said CLARENCE EUGENE MIDDLEBROOKS, JR. is ready to verify. Defendant alleges further that the product he was promoting was substantially the same and that the advertisements in trade journals are identical and that the order forms are identical and further that if Defendant's marketing program was a scheme to defraud, this was a continuing scheme.

5. Defendant further alleges that his mind was so deranged from hurt and pride that he felt that he was being harassed by said Postal Authorities of the United States of America, and was not mentally and emotionally capable during the course of the trial to properly defend himself; that as the record will reflect, had said Defendant had counsel evidence which was material and had a large bearing on the ultimate outcome could have been properly introduced into evidence.

6. That questions which were not raised on the appeal by counsel after the guilty verdict should have been raised are:

A. Should the Court have granted Defendant's Motion to Dismiss the indictment or aided and assisted the Defendant in properly raising the issues of

estoppel by judgment and/or res judicata and/or double jeopardy as the Defendant was unlearned, unskilled and unknowledgeable in law?

B. Should the Court have required the Defendant to obtain counsel or by Order of Court appointed counsel, irrespective of Defendant's desires?

C. Can a Defendant waive a right to counsel when he is emotionally overwrought and obviously unprepared to present facts and is not knowledgeable in law?

7. The presence of the Defendant at this hearing will be necessary due to the technical matter involved and the identification of various exhibits which will be produced at said hearing.

8. Said Defendant alleges that he has no further legal resources open to him and he is prepared to abide by the ultimate determination of this Court subject to his right to appeal from an adverse order which might be entered herein, with or without a hearing, and nothing that he says herein is intended to minimize the seriousness of the offenses involved. The foregoing facts have resulted in his being deprived of his liberty without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States of America.

9. Attached hereto and marked "Defendant's Exhibit 1", made a part hereof by reference, is photocopy of this Honorable Court's Order entered in March 6, 1971.

WHEREFORE, Defendant requests this Court to vacate and set aside the judgment and sentence herein; that should this Motion be denied that this Honorable Court permit said Defendant to appeal from such Order and stay the execution of sentencing pending the outcome of such appeal, permitting the said Defendant to continue at liberty on his present recognizance bond pending the outcome of a hearing on said Motion, and if the ruling is adverse then pending the outcome of said appeal and to grant such other and further relief as to this Court shall seem just and proper.

(Certificate of Service, Signatures and Affidavit omitted.)

ORDER

(Number and Title Omitted)

Filed: Aug. 24, 1971

This cause came on for hearing on the petitioner's motion to vacate judgment and sentence, pursuant to Title 28, United States Code §2255.

For the reasons stated in open court at the conclusion of the hearing; it is,

ORDERED and ADJUDGED that the motion be and is hereby denied.

DONE and ORDERED in Chambers at Orlando, Florida, this 24th day of August, 1971.

(Signed) GEORGE C. YOUNG
UNITED STATES DISTRICT
JUDGE

TESTIMONY AND PROCEEDINGS

(Number and Title Omitted)

Filed: Sep. 29, 1971

Hearing on above held before the HONORABLE GEORGE C. YOUNG, United States District Court Judge, at Orlando, Florida, on August 23, 1971.

APPEARANCES:

J. RUSSELL HORNSBY, ESQ.,
DALE E. ANSTINE, ESQ.,
311 North Rosalind Avenue,
Orlando, Florida
Appearing on behalf of the Petitioner.

ALAN TODD, ESQ.,
Asst. United States Attorney,
Post Office Box 2593,
Orlando, Florida
Appearing on behalf of the Respondent.

* * * *

[68] DOCTOR ARTHUR M. BLOOD,
having been produced and first administered the above oath, testified as follows:

DIRECT EXAMINATION

BY MR. ANSTINE:

Q. Would you state your full name, sir?

A. Arthur M. Blood.

Q. Where do you currently reside, Doctor Blood?

A. 2701 Middlesex Road, Orlando.

Q. How long have you resided there?

A. Eight and a half years.

Q. What type of employment are you engaged in?

A. Medical Physician, Specialty Psychiatry.

Q. Are you licensed to practice that profession in the State of Florida?

A. Yes.

Q. How long have you been so licensed?

A. Since 1945.

Q. Doctor, could you give us a general background as to your professional schooling?

A. I graduated from Emory University School of Medicine in 1945. Had internship at Milwaukee County General Hospital. Was in the Navy for two years and did general practice one year and had three years of certified psychiatric training in New Orleans, St. Louis, and Mayo Clinic. Practiced at Ochsner Foundation in New Orleans, four years of private practice in New Orleans, six years, and been here eight and a half years, both on the staff in the Memorial Hospital and the Florida Hospital here in Orlando and belong to a number of professional organizations, particularly

Orange County Medical Society, Florida Medical Society, Association of American Medical Associates, American Psychiatric Association, Southern Psychiatric Association — those are the primary ones.

I have written four professional papers which have been published.

That is essentially it.

MR. HORNSBY:

At this time, Your Honor, we would like to tender this witness as an expert.

BY MR. HORNSBY:

Q. Dr. Blood, have you ever had occasion to examine professionally Clarence Eugene Middlebrooks, Jr.?

A Yes, I have.

Q. When and where was that examination conducted?

A. It was performed at my office here in Orlando on two different days. On 3/22/71 and 3/23/71. — on two successive days.

Q. Doctor, did you take a history from Mr. Middlebrooks during these interviews?

A. Yes, I did.

Q. What did that history disclose?

A. Well, I took the standard psychiatric history of the persons emotional life so to say. The conclusion of the examination, what it led to essentially was a medical opinion based on certain of the historical fact of the case, plus also my observation, and I was a little bit confused the first time that I saw him and arrived at no conclusion particularly. The second time I saw him

I have some boxed notes in my box category in my notes here which really boils down to what I really thought and I would state here that he was wearing a checkered gray coat partially bald, alert and knowledgeable, a continuous flow of speech never at a loss for words. His facial expression — he chuckles and smiles and he is confident — everything is good. He tends to absolve himself, everything is right, and my opinion was that it suddenly dawned on me these are hypomanic symptoms. The man at the time that I saw him I thought did have hypomania.

Q. Okay, doctor. At the time I would like to ask you a hypothetical question concerning facts similar to those in evidence in this case. Strike that last. Doctor Blood, did you have occasion to interview Mrs. Middlebrooks and Mr. Middlebrooks' mother?

A. Yes, I saw both his wife and his mother.

Q. Thank you, doctor. Did you elicit any facts from them concerning Mr. Middlebrooks?

A. Yes.

Q. Now, Doctor, I would like to ask you a hypothetical. Doctor Blood, what facts did you elicit from Mrs. Middlebrooks and Mr. Middlebrooks' mother during these interviews?

A. Yes, I saw the wife and the mother together jointly. This was last Thursday which was August 19, 1971. Well, several things came up and one is the fact that his mother felt that Mr. Middlebrooks had always been emotionally unstable and cited certain of the emotional development of his earlier life which I think do contribute and confirm my opinion of hypomania.

THE COURT:

Just ask the hypothetical if you would, please.

BY MR. ANSTINE:

Q. Do you have an opinion, doctor, based on a reasonable degree of psychiatric certainty from the history related to you by Mr. Middlebrooks and from your reading of Paragraphs 3, 4 and 5 of the motion to dismiss and portions of the final arguments of his trial, whether or not Mr. Middlebrooks could have intelligently waived his rights to have an attorney defend him in that trial? Just answer the question yes or no?

A. Yes.

Q. Doctor, what is that opinion?

A. I feel that he honestly felt harassed and ruined and depressed and revengeful to the degree that he was determined to do this on his own without any help and damn the consequences, that he really didn't care and as I say I think the man is mentally ill and I think he was likely mentally ill at that time.

Q. Doctor, could you briefly state the reasons upon which you based your opinion?

A. I say that the man is mentally ill — I think he has always been emotionally unstable, granted he had superior intelligence but to me he has not used it wisely and has consistently — not consistently, but he has used poor judgment in regard in regard to vocational work.

* * * *

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1595

CLARENCE EUGENE MIDDLEBROOKS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1969, petitioner was convicted of mail fraud in the United States District Court for the Middle District of Florida. He was sentenced to imprisonment for two years on some counts and placed on probation on the remaining counts. The conviction was affirmed on appeal. 431 F. 2d 299, certiorari denied, 400 U.S. 1009.

At trial petitioner had insisted on representing himself. Immediately after commencing service of his

prison sentence, he filed a motion to vacate under 28 U.S.C. 2255 in which he contended, *inter alia*, that he was not, at the time of trial, mentally competent to waive his right to counsel intelligently and knowingly. To prove this assertion, petitioner produced at the hearing a psychiatrist who had examined petitioner on two successive days in March 1971. Portions of the testimony are set forth in the appendix to petitioner's brief (Pet. App. 14a-17a). The gist of the testimony is that appearing at 17a:

> A. I say that the man is mentally ill—I think he has always been emotionally unstable, granted he had superior intelligence but to me he has not used it wisely and has consistently—not consistently, but he has used poor judgment in regard to vocational work.

The district court denied the motion to vacate and the court of appeals affirmed (Pet. App. 1a-7a). The court of appeals found that, considered in the light of the facts of record with respect to petitioner's conduct of his business and his actions at and after the trial, "the psychiatrist's testimony neither compels nor lends substantial support to the proposition that, as a matter of law, Middlebrooks could not have intelligently and knowingly waived his right to counsel in 1968" (Pet. App. 5a). This conclusion is manifestly supported both by the facts noted by the court of appeals and the testimony of the psychiatrist which petitioner cites.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor Generabl.

JULY 1972.

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